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IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 538

SUNBEAM CORPORATION, a Corporation,
Petitioner

v.

S. A. WENTLING,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit and Brief in Support Thereof.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1950 No.

SUNBEAM CORPORATION, a Corporation,
Petitioner,

v.

S. A. WENTLING,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit and Brief in Support Thereof

To the Honorable the Chief Justice and the Associated Justices of the Supreme Court of the United States:

Sunbeam Corporation petitions for a writ of certiorari to review a decision of the U. S. Court of Appeals for the Third Circuit vacating a decree of the District Court of the United States.

STATEMENT OF THE MATTER INVOLVED

The District Court granted Petitioner injunctive relief against continuance of that part of Respondent's nationally advertised mail order business which consisted of price-

cutting sales of the trade-marked electric razor, the Sunbeam "Shavemaster", manufactured by Petitioner.

The Court of Appeals harshly reversed by limiting the injunction to intrastate sales only.

Respondent Wentling operated entirely from within Pennsylvania, carrying a stock of goods there, placing his advertising in magazines of national circulation from there, receiving orders there through the mails, shipping goods from there, and receiving the proceeds of his sales in that state.

Petitioner had established minimum resale prices for its products by entering into fair trade contracts under the laws of all forty-five states having fair trade laws, including the Pennsylvania Fair Trade Act of 1935, June 5, P. L. 266, as amended June 12, 1941, P. L. 128. Although varying in detail and incidentals, the fair trade acts of all states comply with the requirements of the Miller-Tydings Amendment, in their basic substantive provisions.

After receiving notice of Petitioner's fair trade contracts and minimum prices thereunder, Respondent wilfully continued his cut-price advertising and sales and use of Petitioner's trade-mark "Shavemaster". Respondent claimed that because his sales were in interstate commerce and because he had refused to sign one of Petitioner's fair trade contracts, he was not required to adhere to the minimum prices so established.

The Pennsylvania Act provides that wilfully and knowingly advertising or selling a fair-traded commodity at less than the price stipulated in any fair trade contract constitutes actionable unfair competition, whether or not the seller was a party to the contract.

The Circuit Court treated the Pennsylvania Fair Trade Act as if the Act itself "fixed" prices, concluding that such state "price-fixing" if extended to interstate commerce would be unconstitutional. The court below also treated this Act as if it embodied a state "regulation" of commerce, which would be unconstitutional if extended to interstate commerce.

Petitioner submits that the fair trade acts do not regulate commerce but merely *permit* individuals by contract to establish fair trade prices. The only regulation of fair trade contracts was commenced when Congress enacted the Sherman Act, thereafter judicially construed to forbid such minimum price contracts. Then Congress further regulated commerce and overrode such judicial construction by enacting the Miller-Tydings Amendment which expressly permitted fair trade contracts embodying the substantive requirements specified in the Miller-Tydings Amendment, when such contracts were legal under state laws.

The Court of Appeals' constitutional difficulty as to the permissible scope of the Miller-Tydings Amendment, and its constitutional difficulty as to the scope and effect of the Pennsylvania Fair Trade Act were both based upon a dictum in the case of *Whitfield* v. *Ohio*, 297 U. S. 431 (1936), which case related to sale of prison-made goods. These difficulties have the same effect as a direct holding of unconstitutionality. These constitutional doubts for all practical purposes nullify the state fair trade acts and hold that the Miller-Tydings Amendment was a vain and useless act of Congress, since in purely intra-state matters the Sherman Act does not apply.

Whatever after-effects upon commerce may result from enforcing the standard of fair and equal competition among retailers by uniform prices established under state fair trade acts, the same are indirect, slight, non-discriminatory and "before any operation in interstate commerce occurs" (*Parker* v. *Brown*, 317 U. S. 341 (1942)).

Petitioner submits that Congress may "regulate" commerce by banning or permitting certain types of contracts "affecting" commerce, even though such regulation may affect commerce drastically. Individuals by their contracts cannot regulate commerce. Every contract between individuals, whether local or across state lines, to the extent that such contract restricts services, labor, capital or tangible property to one use, and thus removes its availability for an alternate use, "affects" commerce. The commerce of the various states and of the United States at any given moment is basically the sum of the myriad of contracts then executory or in course of execution.

In the view of the court below, the Miller-Tydings Amendment and the fair trade acts of the forty-five states would be unconstitutional if construed to permit fair trade contracts to have interstate application. If they do not have interstate application and effect, then such acts are, for all practical purposes, vain and useless. The decision, if allowed to stand, will drastically limit the rights of trade-mark owners, and the good-will value developed through federal trade-marks, which the fair trade acts of forty-five states and the Miller-Tydings Amendment seek to protect.

A vast volume of interstate commerce has been built up by mass production of products to be retailed through thousands of stores by national merchandising, based upon

enormous expenditures for national advertising and sales efforts, predicated upon a uniform price structure. The volume of this interstate commerce constitutes the only effective competition to the centralizing power tendencies (if not monopolistic tendencies) of the few great chain stores, mail order houses and large local department stores.

According to statistics from the United States Census of 1939 (the last census for which full figures are available), in that year there were 1,770,355 retail stores, of which 9.6%, hiring six or more employees, did 54.2% of the total business, while 90.4% of the retail stores, hiring five or less, did the remaining 45.8% of the total retail business. The decision below necessarily gravely injures the 1,675,000 small stores which cannot effectively compete with large stores, great mail order houses, and national chain stores, in selling a given item of nationally advertised merchandise identified by a distinctive trademark, unless there is uniformity of price.

Petitioner submits that the proper application, effect and construction of the Miller-Tydings Amendment and of the state fair trade acts, must be reached by considering them in conjunction with the economic background in which they operate. Because of the huge volume of commerce concerned and for the reasons above given, this case involves important questions of local and federal law which should be settled by this court.

Basis of This Court's Jurisdiction

The basis of this court's jurisdiction is the Act of June 25, 1948, C. 646, 62 Stat. 928 (1) (28 U. S. C. A. 1254 (1)).

The judgment of the Court of Appeals was entered on December 8, 1950, and the opinion is reported in — Fed.

(2) —. Petition for rehearing was denied by that court on January 5, 1951.

The opinion of the District Court is reported in 91 F. Supp. 81.

Questions Presented

1. Is not the holding below in conflict with the ruling of the Fifth Circuit (*Schwegmann Bros.* v. *Calvert*, 184 F. (2d) 11, Cert. applied for December 8, 1950, Docket 442) which held that the Miller-Tydings Amendment was effective to permit the establishment of minimum resale prices, under state fair trade laws, which are binding in interstate sales?

2. Did not the Circuit Court of Appeals err in failing to give effect to the Miller-Tydings Amendment which withdrew the Sherman Act ban on minimum fair trade contract, legal under state acts complying with Miller-Tydings specifications?

3. Was not the District Court right in ruling that "Congress has spoken (the Miller-Tydings Amendment) and the legislature of Pennsylvania has spoken and there is no doubt in my mind what was the legislature's intent in both cases", and in granting complete relief as to the trade-marked goods "fair-traded" under the laws of Pennsylvania?

4. Did not the Circuit Court of Appeals err in holding that the Pennsylvania Fair Trade Act would be unconstitutional if construed to permit enjoining interstate price-cutting by individuals operating from headquarters in Pennsylvania?

5. Is not the only regulating of commerce here involved found in the Miller-Tydings Amendment which carved a fair trade exception out of the Sherman Act (held in *Dr. Miles Med. Co.* v. *Park Co.*, 220 U. S. 373 (1911), to apply to trade-marked goods) thereby permitting effectiveness to state fair trade contracts meeting Miller-Tydings specifications?

6. Did not the Circuit Court of Appeals err by construing the Miller-Tydings Amendment to have purely intra-state effect (purely intra-state matters being already within the sole discretion and power of the states) thus imputing to Congress a vain and useless act in adopting the Miller-Tydings Amendment?

7. Should the Circuit Court be permitted to repeal the legislated merchandising policy of forty-five states to protect trade-mark good will by fair trade agreements which prevent unfair price competition which will be distructive of the enormous commerce of mass produced and nationally advertised goods thereunder?

8. Shall the economic value of trade-marks be impaired by destroying the fair trade acts which constitute the principal legislative system devised for their effective protection?

Reasons for Granting the Writ

1. The decision below is in direct conflict with *Schwegmann Bros.* v. *Calvert Distillers*, 184 F. (2d) 11 (1950) (Cert. applied for Oct. Term, 1950, No. 442), in which the Court of Appeals for the Fifth Circuit affirmed a decree

substantially like the decree of the District Court herein, which was reversed in the Circuit Court.

2. The decision below, if allowed to stand, will for all practical purposes nullify the fair trade acts of forty-five states, as well as the Miller-Tydings Amendment. Thus the constitutional issue presented has very great importance to the vast commerce in trade-marked goods, mass produced for the national market, nationally advertised and nationally merchandised.

3. The Court below restricted the injunction to *intra*state sales. It did so because of its expressed doubt of the constitutionality of the Pennsylvania Fair Trade Act if construed to apply to *inter*state offerings made from a place of business in Pennsylvania. If the statute had been held invalid as repugnant to the Constitution, there would have been an appeal as of right. It is submitted that Petitioner ought not to be denied a hearing in this court, simply because the reversal in the court below was predicated upon a doubt or "grave constitutional difficulties" rather than upon an explicit denial of right. The result of the doubts of the Circuit Court is to deny effectiveness to the State Act of Pennsylvania. The discretion of this court should be exercised to review a decree predicated upon such doubt.

4. Because of "difficulties" as to its constitutionality, if regarded as permitting enforcement of minimum prices established under fair trade acts where the offer to sell is interstate, the Circuit Court below treated the enactment of the Miller-Tydings Amendment as a useless thing (except solely that it granted immunity from Sherman Act prosecution, and this notwithstanding that if state fair

trade acts are solely intra-state in character and application the Sherman Act does not apply and a law to grant immunity from prosecution thereunder is unnecessary). The effect of this case is the same as holding the Miller-Tydings Amendment unconstitutional. Sound judicature should call for review of a judgment frustrating an Act of Congress because of "constitutional difficulties".

Prayer

For the foregoing reasons your Petitioner prays that a writ of certiorari may issue out of this court to the United States Court of Appeals for the Third Circuit, commanding said court to certify and send to this court on a day to be determined, the full and complete transcript of the record of all proceedings of such Court of Appeals had in this case, to the end that the case may be reviewed and determined by this court; that the judgment of the Court of Appeals may be reversed and the decree of the District Court reinstated, and that Petitioners be granted such other and further relief as may be proper.

Dated February 7, 1951.

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PETITIONER'S BRIEF SUR PETITION FOR WRIT OF CERTIORARI

I. Reference to Opinions Below and to Official Reports

The opinion of Follmer, J., in the District Court, wherein he granted Petitioner's prayer for injunction, is reported in 91 F. Supp. 81 and attached hereto as Appendix A.

The opinion of Goodrich, J., in the Court of Appeals for the Third Circuit, wherein that court reversed the District Court, is reported in — F. (2d) —, and attached hereto as Appendix B.

Petitioner's petition for rehearing in the Court of Appeals was denied on January 5, 1951.

II. Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked

This court's jurisdiction is invoked under the provisions of the Act of June 25, 1948, C. 646, 62 Stat. 928 (1) (28 U. S. C. A. 1254 (1)).

III. Statement of the Case

Petitioner manufactures and sells electrical appliances all bearing its trade-mark "Sunbeam" and in this case, particularly involving the electric shaver manufactured by it, the additional trade-mark "Shavemaster".

The Sunbeam Shavemaster is in free and open competition with shaving devices of all kinds, of which there are many on the market; here Respondent advertised two com-

peting electric shavers in the same advertisement in which he offered to sell the Shavemaster at a cut price.

Petitioner's products are sold throughout the United States; in the forty-five states having fair trade acts, they are sold under minimum prices established through contracts permitted by those acts. Retail prices established by Petitioner on its products are uniform throughout all the fair trade states. Petitioner's sales of Shavemasters during the three and one-half years from 1946 through June 1949 amounted to over 13 million dollars and during the same period Petitioner spent over $800,000. advertising this product. In 1948 Petitioner sold approximately 3 million dollars' worth of its products in Pennsylvania, of which about 14% represented Shavemaster sales.

Respondent, residing in Palmyra, Penna., operating out of a second-floor bedroom, in 1948 advertised through national magazines, such as the American Rifleman and Field and Stream, and sold Petitioner's Shavemaster razors by mail at $17.25, which was substantially below their fair trade price of $23.50. The purpose of the advertisement was to induce readers not to buy the Shavemaster at the reader's local retail store (where it was offered at the fair trade price) but to send to Palmyra, Penna., for the Shavemaster. In order to carry out this purpose Respondent used and advertised Petitioner's trade-mark without its consent and over its objections. ("This defendant did not advertise merely a razor for sale, he advertised a 'Shavemaster' electric razor." Folmer, D. J., in the opinion below.) Respondent's purpose to divert sales to himself by this type of competition succeeded, as shown by complaints to Petitioner from dealers in some eight states. Although informed by Petitioner that its products were sold under

minimum prices established by contracts entered into under the Pennsylvania Fair Trade Act, the Respondent refused to comply therewith on the ground that his sales were in interstate commerce and fair trade laws thus did not apply to him.

Petitioner obtained an injunction in the District Court restraining Respondent from:

> ". . . committing further acts of unfair competition in relation to Fair Trade marked products of plaintiff, Sunbeam Corporation, and from violating said plaintiff's fair trade agreements. . . ."

On appeal the Court of Appeals for the Third Circuit vacated the decree and limited the injunction to intrastate transactions in Pennsylvania.

IV. Assignments of Error

I. The learned court below erred in entering the following judgment:

> "This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.
>
> "On consideration whereof, it is now here ordered and adjudged by this court that the decree of the said District Court in this case be, and the same is hereby vacated, with costs, and the case remanded to the District Court with directions to enter a decree limiting the injunction against the defendant to intrastate transactions in Pennsylvania, and for further proceedings not inconsistent with the opinion of this court."

II. The learned court below erred in vacating the following decree of the District Court:

"Now, to wit, June 10, 1950, the defendant, S. A. Wentling, is permanently enjoined and restrained from committing further acts of unfair competition in relation to Fair Trade marked products of plaintiff, Sunbeam Corporation, and from violating said plaintiff's fair trade agreements, and the defendant's counterclaim is dismissed."

V. Argument

1. The Miller-Tydings Amendment Constitutionally Affects Interstate Commerce by Permitting Fair Trade Contracts Establishing Resale Prices in States Having Fair Trade Acts Complying With Miller-Tydings Specifications.

The Miller-Tydings Amendment, in making workable our federal system of government, is akin to the wise cooperation in the Webb-Kenyon Act (27 U. S. C. A. 122), and in Public Act 15 (15 U. S. C. A. 1011).

This court had sustained the Illinois Fair Trade Act not as a price fixing act but as permitting price establishment, in contracts by trade-mark owners, in order to protect their good will in their trade-marks: *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183 (1936).

There is no federal common law: *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1939). The state is not impliedly impotent to permit fair trade contracts permitted by the Miller-Tydings Amendment when complying with Miller-Tydings specifications.

There is no regulation here except by Congress. The state does not "regulate" but merely permits contracts permitted by Miller-Tydings. These contracts by individuals

do not and could not "regulate" commerce, and they "affect" commerce as such, if at all, only indirectly and slightly. In another sense every contract between individuals affects interstate commerce, either directly or indirectly, by restricting the use of services, labor, capital or tangible property to a particular purpose, thus making them unavailable for other purposes. Even if regarded as state action, since the goods are fair-traded before being sold, regulation is "imposed before any operation of interstate commerce occurs": *Parker* v. *Brown*, 317 U. S. 341 (1942) (Stone, C. J.), and hence would be valid "however drastically it may affect commerce."

Without analysis or indeed much discussion the court below dismissed the Miller-Tydings Amendment (set forth in Appendix C herein) with the statement: "But the Miller-Tydings Act in no way, we think, affects any question of defendant's liability to plaintiff."

The pertinent part of the Miller-Tydings Amendment reads as follows:

> ". . . *nothing contained in sections 1-7 of this title shall render illegal*, contracts or *agreements prescribing minimum prices for the resale of a commodity which bears*, or the label or container of which bears, *the trade mark*, brand, or name *of the producer or distributor* of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, *when contracts or agreements* of that description are lawful *as applied to intrastate transactions, under any statute*, law or public policy now or hereafter in effect *in any* State, Territory, or the District of Columbia *in which such resale is to be made, or to which the commodity is to be transported for such resale, . . .*" (emphasis supplied).

As to purely intra-state transactions nothing in the Sherman Act could render them legal or illegal.

As to interstate sales, either the Congress has spoken or Congress has not spoken. If Congress has not spoken, then the Pennsylvania Fair Trade Act could be unconstitutional, as applied to interstate commerce, only because the Commerce Clause is self-executing and impliedly prohibits the interstate movement of goods having minimum resale prices under contracts permitted by state laws. This cannot be in respect of non-discriminatory acts permitting such contracts pursuant to policies deemed for the welfare of the state. But the Congress has spoken. By the Miller-Tydings Amendment, it has left not merely a void open for state action, but it has created a specific exception to the Sherman Act and its anti-trust policy. It has reversed the *Dr. Miles* case which held (Holmes dissenting) that price maintenance agreements of trade-marked goods *in interstate commerce* violated the Sherman Act. It has said that the prohibition of the Sherman Act shall not apply to fair trade contracts concerning trade-marked goods when permitted by state acts.

The repeal of a prohibition whether legislative or judicial is an effective expression of policy. The power of Congress over commerce and resale price maintenance therein arises under the Commerce Clause which gives Congress power to "regulate" commerce among the states. The Sherman Act was enacted under that clause and relates to interstate transactions only. That is the only way in which Congress has regulated that phase of interstate transactions.

The Congress is the policy-making power in the interstate field, and it has declared that the Sherman Act policy

shall not apply here. The doubt or the question as to constitutionality does not find sound basis in the question in the *Whitfield* case relied on by the court below. The Ohio indictment in the *Whitfield* case (297 U. S. 431 (1936)) had two counts: (a) one for shipping prison-made goods from the prison in Alabama to a person in Ohio, and the other (b) for the "open market" sale in Ohio of such prison-made goods. (The act prohibited (b) only.) It was as to (a) that the court (Sutherland, J.) expressed the constitutional question: and why not, making an Ohio crime out of a shipment *from* an *Alabama* prison? (And the doubt was dictum: the Ohio act did not apply at all.) But the court fully sustained (b), Ohio's power over what happened in Ohio, though the prison-made goods had come in interstate from Alabama; and fully sustained Congress' power so to permit Ohio, whether the goods were in the original package or no, and notwithstanding the previous immunity of goods while in the "original packages". The prohibitive provisions of the Ohio act were sustained as to goods in the original packages *because Congress had power to decide when* goods are in interstate commerce, and had elected to determine that prison-made goods were not in interstate commerce, though still in original packages.

By the Miller-Tydings Amendment, Congress opened the way for state fair trade acts to become effective before fair-traded goods are loaded for shipment across state lines. The doubts in the *Whitfield* case are far afield here. The parallel would be an Ohio statute forbidding shipments of prison-made goods *from Ohio*, or forbidding any sales (including interstate sales) of prison-made goods. In the case at bar, Pennsylvania dealt only with what was done in

Pennsylvania, in which state Respondent's sales, whether intra- or interstate, are initiated.

In the course of its opinion the Court of Appeals said, with reference to the Miller-Tydings Amendment:

> "This statute was much discussed by both parties at the argument. We think the statute was intended to relieve persons entering into contracts of the type provided for in these fair trade acts from liability under United States anti-trust laws. The legislation was necessary, if such immunity was to be had, because price maintenance agreements had previously been held to be a violation." (The *Dr. Miles* case).

This is completely illogical. The effect of the opinion is to construe contracts under state fair trade acts as purely intra-state in operation and effect. But the court concedes that fair trade contracts under state laws might involve Sherman Act violations (if there were no Miller-Tydings Amendment) notwithstanding that the Sherman Act applies only to interstate transactions. The court thus concedes that transactions under state fair trade acts do operate interstate, and do so legally by virtue of the Miller-Tydings Amendment.

Thus, apparently the court below was of the opinion that, insofar as trade-marked goods are concerned, the anti-trust laws are non-existent with respect to sales to or from a state having fair trade laws. That Petitioner might, with impunity, refuse to sell and get others not to sell the Respondent its trade-marked goods for resale, unless the latter signed a fair trade contract. (This is indicated by the fact that the court did not in its opinion mention the Respondent's counterclaim wherein he alleged the Petitioner, by allegedly trying to cut off his sources of supply, had vio-

lated the anti-trust laws.) But upon the dictum in *Whitfield*, the court below based its doubts as to constitutionality if the Miller-Tydings Amendment were given further effect than merely removing the Sherman Act ban, and dismissed that Act as having no further effect. In short, the court below said the Miller-Tydings Amendment has some interstate effect but not very much. This we submit led to grave error.

The Miller-Tydings Amendment was not a mere ordinary repealer. It did not merely carve a segment out of the Sherman Act, a safety island immune from the ban of the act.

It dealt with the border line (constantly crossed in national merchandising) between federal and state action, in order to make workable our dual system in that sphere.

Forty-two states at the time of enactment of the Miller-Tydings Amendment had fair trade acts (one had been sustained by this court):

Old Dearborn Co. v. *Seagram Corp.*, 299 U. S. 183 (1936) saying (194):

> "And good will is property in a very real sense injury to which . . . is a proper subject for legislation"
>
> and a purchaser may "sell the commodity at any price he pleases" "provided he can do so without utilizing the good will of the latter as an aid to that end." (195).

Congress could have adopted a federal fair trade act. Hearings on such bills had been had: See 299 U. S. 190. But that would have been to coerce the states.

This court has treated the Miller-Tydings Amendment to the Serman Act as in effect a Federal "Fair Trade"

Act. In *U. S.* v. *Frankfort Distillers*, 324 U. S. 293 (1944) the defendants were indicted for violating the Sherman Act. In the course of his opinion sustaining the conviction Mr. Justice Black said, at page 296, 297:

> "The effect, and if it were material, the purpose of the combination charged, was to fix prices at an artificial level. Such combinations, affecting commerce among the states, tend to eliminate competition, and violate the Sherman Act per se. *United States* v. *Socony Vacuum Co.*, 310 U. S. 150, 223-224. Price maintenance contracts fall under the same ban, *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 458, except as provided by the 1937 Miller-Tydings Amendment to the Sherman Act. 50 Stat. 693. The combination charged against respondents does not fall within this exception. It permits the seller of an article which bears his trade mark, brand, or name, to prescribe a minimum resale price by contract, if such contracts are lawful in the state where the resale is to be made and if the trade-marked article is in free and open competition with other articles of the same commodity. This type of 'Fair Trade' price maintenance contract is lawful in Colorado. Session Laws of Colorado, 1937, Chap. 146. But the Miller-Tydings Amendment to the Sherman Act does not permit combinations of businessmen to coerce others into making such contracts, and Colorado has not attempted to grant such permission. *Both the federal and state 'Fair Trade' Acts expressly provide that they shall not apply to price maintenance contracts among producers, wholesalers and competitors.* It follows that whatever may be the rights of an individual producer under the Miller-Tydings Amendment to make price maintenance contracts or to refuse to sell his goods to those who will not make such contracts, a combination to compel price maintenance in commerce among the states violates the Sherman Act." (Emphasis supplied.)

Congress took action essentially coöperative in its nature: it described the essential features of the existing fair trade acts and, in the exercise of its power to "regulate" commerce, said that the federal policy as to price maintenance contracts in general should not apply to agreements determining resale prices of trade-marked goods where favored by the policy of the state; i.e., that federal policy yielded to such state policy.

Congress must have acquiesced in the belief that the owner of a trade-mark is entitled to protection in his good will against unfair competition from price-cutters selling not merely an article of merchandise but a trade-marked article. Congress obviously approved the market-wise philosophy of the late Mr. Justice Brandeis* who so cogently set forth the wrong to the trade-mark owner and to the public in price-cutting of trade-marked goods. And forty-five states with the permission of Congress have adopted that philosophy.

Varying regulations of commerce have different effects which may give rise to sound distinctions as to the power of Congress and the states.

"Regulating" may mean out-and-out prohibition or qualified prohibition as in the case of stolen cars, or direct interference with movement across state lines, or indirect interference.

As to goods, "regulation" by Congress may take multitudinous forms, and as in the case of anti-trust statutes, may have no direct relation to the goods or their flow, but are intended to accomplish some desired end of public policy. Congress may prescribe or prohibit certain contracts or methods of merchandising. This purpose has no direct re-

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* See Appendix E, page 22a.

lation to the flow of commerce itself or to the extent thereof. It may or may not tend to increase or lessen such flow.

One of such indirect regulations, in order to accomplish a purpose deemed for the public welfare, is the Sherman Act. It does not ban goods; it bans contracts "in restraint of trade" as to goods in interstate commerce. This may tend to increase or decrease the flow of goods across state lines. But that is immaterial, it's the general welfare or the proper objective that counts; not the extent of the traffic.

Just as Congress may attain its anti-trust objective, irrespective of its effect upon volume of traffic, so it may permit the states, in order to attain another general welfare objective, to do justice to the owners of trade-marks and permit orderly and non-discriminatory price structures without haggling or cutthroat price-cutting, to have their own policy as to that segment of contracts affecting commerce and to give the states freedom to permit contracts previously dealt with by the Sherman Act. In a nutshell, Congress may permit free-trade in fair-traded goods across as well as within state lines, and freedom of contract to determining resale prices on one's own trade-marked goods.

2. STATE FAIR TRADE ACTS, SUCH AS PENNSYLVANIA'S, ARE CONSTITUTIONAL, WHETHER

(a) *as an invited interlocking with the Miller-Tydings Amendment, or*

(b) *viewed merely as occupying territory abandoned by Congress, or*

(c) *as if the pre-Sherman Act conditions were restored and thus merely indirectly affecting, not regulating, interstate commerce, or*

(d) *as if irrespective of where title passes, the "sales" take place in Pennsylvania, where respondent lives, where he receives and accepts orders and cash and stores and ships fair-traded Sunbeam razors.*

(a) *"As an invited interlocking with the Miller-Tydings Amendment."* That Congress recognized existing state action and invited like state action has been shown from the federal standpoint.

Now for the state point of view: Pennsylvania was one of the 42 pre-Miller-Tydings states. It amended its fair trade act, which was in effect a reenactment of the entire act. (The pertinent provisions of said act are set forth in Appendix "D", page 21a.) (No reenactment was necessary: *Wilkerson* v. *Rahrer*, 140 U. S. 545, 565 (1891).)

Congress' description carried with it a requirement for non-discriminatory action. There is no suggestion that the Pennsylvania Act does not fully comply with the Miller-Tydings requirements, or indeed, in the dissecting of irrelevant differences, that any of the forty-five states fair trade acts does not fulfill the Miller-Tydings specifications. Accordingly Pennsylvania "permits the designated private

persons to contract with respect thereto:" *Old Dearborn* v. *Seagram*, 299 U. S. 183, 192 (1936), *and requires all persons having notice of the contract to refrain from any conduct which would impair or destroy it.*

(b) *"Viewed merely as occupying territory abandoned by Congress"* or

(c) *"As if the pre-Sherman Act conditions were restored. . . .*

There must be significance in Congress' action in occupying and then partially evacuating. In 1890 Congress adopted a new federal policy regarded as revolutionary. Under the power to "regulate commerce" it dealt with contracts "in restraint of trade" in respect of goods crossing state lines. Came the *Dr. Miles Medical* case, 220 U. S. 373 (1911) and contracts fixing the resale prices of trademarked goods were construed to be "in restraint of trade". Then in 1937 came Miller-Tydings, not giving permission to *all* such contracts but *only those in states having fair-trade acts of a designated sort.*

The significance of the Congressional departure from the Sherman Act, by its adoption of Miller-Tydings, was that at the time there were already in existence fair trade acts in 42 states. Congress would deal only with things affecting interstate commerce.

The court below has raised the ante- '90 spectre as though pre-Sherman Act were restored. We quote:

> "But the Miller-Tydings Act in no way, we think, affects any question of defendant's liability to plaintiff."

However, the court had just conceded that Miller-Tydings had put the quietus on the Sherman Act as regards

"*contracts of the type provided for in these fair trade laws.*" But as "affects any question of defendant's liability to plaintiff", we are told by the Court of Appeals, between the commerce clause (Congress shall have power to . . . regulate) and the Fair Trade Act (trade-mark owners may make fair trade contracts), there is grave danger of a constitutional collision if those fair-traded goods cross state lines; so the fair-trade contracts must be restricted to home state use only. This assumes that fair trade acts constitute state regulation notwithstanding that this court said in the *Seagram* case, 299 U. S. 183 (1936), that the (Illinois) act "does not attempt to fix prices, nor does it delegate such power to private persons. It permits the designated private persons to contract with respect thereto. It contains no element of compulsion . . ."

To "regulate" in the commerce clause means to regulate by legislative action:

> "The power to regulate commerce, vested in congress, is the power to foster, protect and control commerce, to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted, to determine when it shall be free, and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged." *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215 (1884).

The manifest vice of the opinion below is that its entire ratio decidendi assumes that the fair trade act *regulates*. The court below relied upon the decision in *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945) striking down

an Arizona law *fixing* the length of all passenger and freight trains. Then it proceeded to regard the Pennsylvania Fair Trade Act as though it similarly constituted direct state regulation. The application of the assumption appears from the opinion as follows:

> ". . . in the absence of an occupation of the field by Congress a *state may regulate* some aspects of interstate commerce."
>
> ". . . even in the absence of Congressional action the commerce clause is a limitation of the *power of the states to regulate* interstate *commerce.* A state may not regulate . . ."
>
> ". . . the protection of interstate trade against *state interference.*" (Emphasis supplied).
>
> ". . . the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference."

The court below belabors the straw man of state regulation, *when there is no state regulation:*

> "Further, if a state may *regulate* the price at which an article must be sold if it is to be shipped out of the state, may it not *equally well regulate* the price for which the article must *have been sold before it is allowed to come* into the state?" (Emphasis supplied.)

(Of course the fair trade act permits no such contracts.) On the other hand, this court has said a fair trade act is not a price-fixing act: *Old Dearborn* v. *Seagram*, 299 U. S. 183, 192 (1936). Indeed a price-fixing act would be invalid: *Commonwealth* v. *Zasloff*, 338 Pa. 457, 13 Atl. 2d, 67 (1940).

So the "grave constitutional difficulties" which result (a) in condemning the states to implied impotency to father

effective fair trade acts and (b) in emasculating the Pennsylvania Act may be dismissed as baseless.

The fair trade system is not considered as a state regulation of commerce, but rather as a limitation upon what Congress regards as excesses of competition. Mr. Justice Reed, in his dissenting opinion in the case of *Standard Oil Co.* v. *F. T. C.*, — U. S.: —, p. — said:

> "The public policy of the United States fosters the free enterprise system of unfettered competition among producers and distributors of goods as the accepted method to put those goods into the hands of all consumers at the least expense. There are, however, statutory exceptions to such unlimited competition.[4]
>
> "4. E. G., Interstate Commerce Act, Section 5, 49 U. S. C. Section 5; Communications Act of 1934, Section 221, 47 U. S. C. Section 221; *Miller-Tydings Act*, 15 U. S. C. Section 1, and C. Mason, 'The current status of the monopoly problem in the United States', 62 Harv. L. Rev. 1265." (Emphasis supplied.)

The minimum wage law may also be regarded as Congressional limitation in the excesses of competition.

Moreover, the fair trade acts are not mandatory, they are permissive only. The state fixes no prices; it merely permits, but does not require, a manufacturer of a commodity bearing a trade-mark to fix a minimum resale price to consumers by contracts. A standard of equal competition is thereby established among all dealers handling the trade-marked product and *relying upon that trade-mark to enable them to sell the product.* It is a well-known fact, however, that many manufacturers, particularly those making more expensive appliances, suggest but do not fix, resale prices. Where manufacturers see fit to take advantage of

the fair trade acts, it is the contract they make with the retailers that establishes the minimum price.

Upon the assumption that the State of Pennsylvania and the other 44 states having fair trade acts "fix" prices, the court below founded its "grave constitutional difficulty" based upon a hypothetical illustration of a non-uniform retail price in different states. This is contrary to the fact and contrary to the reasonable inference from the record facts. An important and far reaching ruling ought to be based upon facts, not upon what might happen.

(d) "*As if irrespective of where title passes, the "sales" take place in Pennsylvania, where Respondent lives, where he receives and accepts orders and cash, and stores and ships fair-traded Sunbeam razors.*" Local law should apply in a matter primarily within the state jurisdiction as to the conduct of citizens within the borders of the state, even though such conduct may affect at a later point goods crossing state lines. The state should have power by non-discriminatory laws to make its policy effective upon its citizens. A state's anti-trust laws should be uniformly binding upon its own citizens until Congress regulates the interstate sphere. So also to state laws concerning contracts, including fair trade contracts made within the state. The sales of the fair-traded goods should be regarded as being made in Pennsylvania. At some time in the correspondence, after the order is received in Pennsylvania, and before the shipment of the razor, there is a meeting of the minds. A contract takes place. That is a contract of sale irrespective of terms thought up to secure a supposed interstate immunity from Pennsylvania law. The rights of the states should be respected.

The Pennsylvania Fair Trade Act is applicable to Respondent's sales regardless of where title passes.

While the Court of Appeals did not think the point important, the Respondent both in that court and in the District Court argued at length that the Pennsylvania Fair Trade Act did not apply to him because he sold in such a way that technical title to the Shavemasters in question may have passed to the customer in other states.

The Respondent is a citizen and inhabitant of Pennsylvania. There originates his national advertising and offering for sale (which circulates in Pennsylvania, as well as elsewhere) and there he receives and accepts the orders and the cash. There are stored and from there are shipped the fair-traded Shavemasters. All the transactions in connection with Respondent's mail-order business, including entering into the contracts pursuant to which the fair-traded goods are shipped, are made in Pennsylvania. Pennsylvania and Pennsylvania alone has jurisdiction over Respondent and his course of conduct within that Commonwealth. The Pennsylvania Fair Trade Act is general in its language and plainly applies to Respondent's business.

Petitioner's fair-trade contracts are "contracts relating to the sale or resale" of a trade-marked commodity within the meaning of the Fair Trade Act. They are general and unrestricted in their terms. Respondent persisted after repeated notices that "Sunbeam" and "Shavemaster" had been fair-traded. That under the Act was unfair competition. It was unfair competition in all states having fair trade laws. It was an attack upon and impairment of Petitioner's Pennsylvania contract, as well as its contracts in all fair trade states. The Act validly applies irrespective of

the terms of shipment allegedly contained in Respondent's contracts, *all of which were made in Pennsylvania.*

The validity of a contract, with respect to legality, depends upon the place of contracting: *Restatement of Conflict of Laws*, Sec. 332 (e); and see *Goodrich on Conflict of Laws*, Sec. 107, wherein it is stated that the better rule is that the situs of the contract governs as to its validity. Under the law of Pennsylvania the Respondent's offer and agreement to sell at less than fair trade prices violated Pennsylvania's Fair Trade Act and Petitioner's contract thereunder, was unfair competition and illegal.

The difficulty labored by Respondent arises from attempting to narrow the meaning of "sale" to the passing of title and hence to the consummation by delivery. An executory sale is a binding contract to sell and as much a "sale" in customary parlance whether it be consummated f.o.b. Palmyra, Pa. or Palmyra, N. Y. A house is offered for sale by a "FOR SALE" sign which is often replaced by a "SOLD" sign before the property is paid for and deed delivered.

It is unthinkable that Congress or the Pennsylvania legislature meant that technical and sometimes shadowy rules of the laws of sales as to when legal title passes should determine whether a retail resale was interstate commerce or not. (As an example of this shadowy line as to passage of title compare Pennsylvania Statute 69 P. S. 143, Rule 5, with, *Commonwealth* v. *Wiloil Corporation*, 316 Pa. 33, aff'd 294 U. S. 169 (1934) and *W. G. Ward Co.* v. *American Lumber & Manufacturing Co.*, 247 Pa. 267 (1915). While this distinction may be invoked to prevent the state in which goods are delivered across state boundaries from asserting that the consignor is doing taxable business notwithstand-

ing that all sales are made f.o.b. point of shipment it is obvious that the effect upon interstate commerce, if any, does not vary according to whether a sale is f.o.b. or C.O.D. The point is not as the court below seemed to think whether one is interstate commerce and the other not—the real "commerce" in either case is the transit of the goods. The price maintenance clause is not commerce, though it may be said to "affect" it. The price maintenance clause is effective before any shipment takes place whether f.o.b. or C.O.D. The shipment from a point in Pennsylvania at a cut-price in violation of the state policy completes the tort. Regardless of the technical form of the sale, the state should not be powerless to enforce the contractual policies permitted by its legislation.

3. THE DECISION BELOW, IF PERMITTED TO STAND, WILL EFFECTIVELY NULLIFY THE FAIR TRADE ACTS OF FORTY-FIVE STATES AND THE PUBLIC POLICY EMBODIED THEREIN, TO THE GREAT INJURY OF MANUFACTURERS, RETAILERS AND THE PUBLIC.

Statutes should be construed by courts so as to make them fully effective, except when they are clearly unconstitutional. In the actual economic environment in which fair trade laws operate, interstate application is required to make them fully effective.

Limiting fair trade acts to intrastate application repeals them for all practical purposes.

In his brief below, Respondent argued that the fair trade laws were merely a depression measure of the 1930's to combat falling prices, price wars, cut-throat competition among retailers and the problem of "loss leaders". The Circuit Court apparently was taken with this argument and in its opinion says:

> "The local cut price sale with a loss leader feature, which seems to have constituted a much stressed argument for the legislation, is adequately cared for in giving the statute a local application only."

The Court of Appeals totally ignores the reality that all national magazines and the advertisements therein are read locally, are intended to, and do have local effect.

The Respondent argued below that he is not selling "loss leaders" and since he has no store, in the usual sense, in Palmyra, Pa., he is not competing with local merchants. The simple fact of the matter is that Respondent, taking advantage of the existence of an established price under the fair trade law and to the disadvantage of law-abiding re-

tailers, *sells nothing but loss leaders.* He competes with retailers in Palmyra, in Harrisburg and in Philadelphia. He, by his unlawful advertisements, competes with each of Plaintiff's 70,000 dealers throughout the country. He violates and impairs fair trade contacts authorized by the legislative policy of 45 states.

Obviously, advertising of cut prices on a national scale does more harm to the goodwill attached to Petitioner's trade-marks than does the most flagrant violation carried out at a local level. In the case at bar, dealers from eight states complained to Petitioner of Respondent's unfair competition. But, the court below says in effect that Respondent can continue such advertising, using Petitioner's trade-marks, so long as he adds a clause in his national advertising: "This doesn't apply in Pennsylvania". Also the court intimates if Respondent so chooses he can rent another second floor bedroom across the river from Philadelphia, in Camden, New Jersey, and advertise in the Pennsylvania papers:

> "Shavemasters for sale at $17.50, mail and phone orders accepted here, your purchase will be mailed to you C.O.D. in Pennsylvania."

Since the Pennsylvania dealer cannot sell the product at the fair trade price when his customer knows he can obtain it from Respondent, or some other mail order dealer, at a lesser price, the local dealer is forced to abandon the fair trade price. No court of equity will enjoin him; such an injunction would put the local dealer out of business. The court will be obliged to hold that there is no equitably enforceable price structure. What then happens to the Circuit Court's opinion that local price cutting "is adequately

cared for in giving the statute local application only"? Petitioner respectfully submits that the learned court's opinion is an economic impossibility.

Either the Fair Trade statutes apply interstate as well as locally, or they don't apply at all, and must be considered dead letters upon the statute books.

The Court of Appeals set up an economic straw man theory of what might happen under fair trade laws. It invented a hypothetical example, in no way justified or supported by the record in the case, or by the actualities of business, to attempt to prove that interstate application of the fair trade acts would create unconstitutional trade barriers. In setting up its hypothetical economic never-never land, the court said:

> "There is no [specific] requirement that the established fair trade price be uniform throughout the states. Thus we have the possibility of a situation where, for instance, the fair trade price of an article has been fixed in Pennsylvania at $1.00 and in South Carolina at 75¢. If the Pennsylvania statute is permitted to govern interstate sales, no sales in that commodity can be made by Pennsylvania sellers to South Carolina buyers. If the Pennsylvania seller were to meet the competition of South Carolina sellers, he would commit a tort in Pennsylvania, and yet he would be selling at the very price set in South Carolina as "fair trade". Further, if a state may regulate the price at which an article must be sold if it is to be shipped out of the state, may it not equally well regulate the price for which the article must have been sold before it is allowed to come into the state? Tariff barriers are but feeble obstacles compared with such a blockade on the interstate movement of goods."

Petitioner's prices are in fact uniform throughout all the forty-five fair trade states. Prices are established by Petitioner's Executive Committee and are listed in a supplement circulated to the trade. When there is a price change, as for instance when a new model is introduced, a new supplement is issued, applying under contracts in all of those states. As appears from the deposition of Petitioner's Vice President "a supplement" is published, not two, or three, or 45 different supplements.

Implicit in the fair trade act is the requirement that the minimum resale price established be uniform in any one competitive area. *Calvert Distillers Corp.* v. *Nussbaum Liquor Store, Inc.*, and *Seagram-Distillers Corp.* v. *Same*, 166 Misc. 342, 2 NYS (2d) 320 (1938), *Hutzler Bros. Co.* v. *Remington Putnam Co.*, 186 Md. 210, 46 A. (2d) 101 (1946).

Because of the existence of national chain stores and mail order houses, as well as because of advertising in nationally circulated periodicals, and radio and television broadcasting, the entire country is one competitive area with respect to all nationally distributed trade-marked merchandise.

The great influence which chain stores and mail order houses (now licensed to price-cut by the opinion below) exert in the retailing field is shown by the fact that total retail sales of chain stores and mail order houses in 1949 were one-fifth of all retail business, namely, $27,188,000,000, out of the aggregate retail sales of all retail stores whatsoever in the amount of $128,183,000,000. (and in such figures catalogue business only is shown as mail order; sales of retail stores owned by general merchandise mail order companies being included in statistics with department

and other stores). See Tables 1052 and 1042, pages 901 and 891, respectively, of the *Statistical Abstract of the United States*, 1950."

Added to the impact of the mail order stores, there should be considered the interstate impact of the great department stores found in all of the large cities throughout the United States, each of which attract customers far beyond the borders of the state in which they are located and many of whom advertise in magazines and periodicals of national circulation.

There is no such thing in the United States as a purely local, segregated, walled-in market limited to the boundaries of a particular state with respect to nationally advertised merchandise known by a distinctive trade-mark. There is only one market and that is the entire country.

It follows by reason of economic necessity that the manufacturer who distributes his product in the national market under a distinctive trade-mark, by means of continuous and heavy national advertising (such as Petitioner does) is compelled to set one single, uniform price. If the manufacturer attempted to establish different prices in different states, no court would, or could, in equity and good conscience enjoin any dealer under the fair trade laws from meeting the lowest price set. In fact, under the law which has now accumulated under the fair trade statutes, it is plain that if different prices were permitted any court would be obliged to rule that the manufacturer had failed to establish a bona fide fair trade price structure under the fair trade acts, or that, in any event, such a structure was unenforceable.

If Respondent can without permission (in fact contrary to the expressed wish of the manufacturer) advertise

the trade-mark of Petitioner to destroy it's price structure, then the value of that trade-mark is substantially destroyed. If Respondent can avail himself, without cost, of the retailing function of constant local display and demonstration of the product, which the legitimate local retailer has already performed, and is constantly performing, then the local retailer cannot afford to handle the product. Such predatory and parasitic transactions are precisely what the court below has authorized.

In Section 33, relating to "Distribution and Services", of the *Statistical Abstract of the United States* (1950), it is clearly shown that a great percentage of the distribution of goods at the retail level in the United States is controlled by comparatively few stores. Table 1046, page 893, based on the 1939 census (the last census figures presently available), reveals the following: There were a total of 1,770,355 retail stores; those employing 100 or more employees numbered one-tenth of 1% of the total number of stores, *yet they did 11% of the entire retail business.* Stores employing six or more employees constituted approximately 9.6% of all the stores in the United States, yet they did approximately 54.2% of the total sales in 1939. There is no reason to believe that the 1949 census will show a reversal of such concentration of power.

It is obvious that with respect to durable goods (such as Petitioners) of which the consumer normally buys only one unit at intervals of several years or more apart, the 90.4% of the small stores hiring five or less employees cannot possibly stay in competition with the remaining 9.6% on such nationally advertised merchandise unless there is a uniformity of price. In a price war, the large units can always operate more economically and can even handle

trade-marked merchandise at cost in order to attract people into their stores; in either event the small units will inevitably be pushed out of the market.

Ironically, if Respondent's views prevail, his mail order customers will have no established national price against which to decide whether or not Respondent's offer is a bargain. Or, if another mail order house advertises the Shavemaster at cost, as an inducement to get customers, who would be foolish enough to pay Respondent anything higher? If the Court of Appeals is sustained, Respondent, sooner or later, will perceive that he has won a Pyrrhic victory!

Not only would Respondent suffer a Pyrrhic victory, but Petitioner, its wholesale distributors, its 70,000 retailers, and the public would suffer because large scale mass production, with the consequently lower price to the general public, can only be scheduled on the basis that there are many stores throughout the United States each stocking and actively engaged in selling the manufacturer's products. Once the remaining portion of the retail market gravitates into the hands of a tiny percentage of all of the stores, such widespread distribution of a manufacturer's product becomes impossible and there is no longer any nationally advertised price standards to serve as a competitive check on prices charged by the big stores on their private and unknown brand goods. The manufacturer himself is then reduced to being a supplier to a few big stores and mail order houses, and in order to survive must meet specifications as cheaply as possible. Whereas, when he manufacturers under his own trade-mark his competitive incentive is constantly to produce a finer article.

Contrary to the opinion of the court below, it is clear that fair trade acts are not barriers to trade and commerce.

They aid and increase the flow of commerce by fostering effective competition to the great power concentrated in a few large stores, chains and mail order houses.

The decree of the District Court did not interfere with interstate commerce; it merely interfered with Respondent's price-cutting activities. Respondent's price-cutting is only possible because he advertises "Shavemaster" and operates with none of the legitimate retailer's usual overhead. Mass merchandising is not practical if so confined. Furthermore, if Respondent and others can avail themselves, without cost, not only of Petitioner's trade-mark and goodwill, but of the retailing function of constant local display, demonstration and availability of the product, which the legitimate local retailer has already performed and is constantly performing, then the local retailer cannot recover his costs and cannot afford to handle the product.

Price cutters reap where they have not sown. And in so reaping they may erode and make barren the field.

Such predatory conduct by Respondent should not be tolerated. In *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, 193 (1936), this court said in dealing with a nonsigner, having knowledge of fair trade contracts:

> "Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, *upon every principle of fair dealing*, assent to the protective restriction, with consequent liability under Sec. 2 of the law

by which such acquisition was conditioned." (Emphasis supplied).

Mr. Justice Brandeis, as quoted in Alfred Lief's book "The Brandeis Guide to the Modern World", had the following to say with respect to the dealer's right to cut prices (see Appendix E):

> "If a dealer is selling unknown goods or goods under his own name, he alone should set the price; but when a dealer has to use somebody else's name or brand in order to sell goods, then the owner of that name or brand has an interest which should be respected. The transaction is essentially one between the two principals—the maker and the user. All others are middlemen or agents; for the product is not really sold until it has been bought by the consumer.
>
> "Why should one middleman have the power to depreciate in the public mind the value of the maker's brand and render it unprofitable not only for the maker but for other middlemen? Why should one middleman be allowed to indulge in a practice of price-cutting, which tends to drive the maker's goods out of the market and in the end interferes with people getting the goods at all?"

Mr. Justice Holmes in his dissenting opinion in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911) at 412, more forcefully expressed the same thought and said:

> "I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own, and thus to impair, if not destroy, the production and sale of articles which it assumed to be desirable that the public should be able to get."

The Miller-Tydings Act is congressional recognition of the soundness of Mr. Justice Holmes' economics.

It is respectfully submitted that Judge Follmer of the District Court was well supported by authority when he said, in his opinion:

> "As stated in Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra, even though this plaintiff parted with the ownership of the six shavers involved in this case, it did not part with the good will that it had at great expense built up around the trade-mark name of those razors, namely, 'Sunbeam' and 'Shavemaster'. This defendant did not advertise merely a razor for sale, he advertised a 'Shavemaster' electric razor. By so doing he has invaded a right that this plaintiff has been given by the Fair Trade Act of the Commonwealth of Pennsylvania in respect to a sale made under the terms of that Act and that trade-mark must be kept inviolate whether the sale is intrastate or interstate."

It is respectfully submitted that a writ of certiorari should issue to the Court of Appeals for the Third Circuit as prayed for in the annexed petition.

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APPENDIX A

Opinion of the District Court

This is a suit for injunctive relief and damages under the Fair Trade Act of the Commonwealth of Pennsylvania, approved June 5, 1935, P. L. 266, as amended June 12, 1941, P. L. 128.

The title to the said Act reads as follows:

> "To protect trade-mark owners, distributors, and the public against injuries and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name."

The pertinent portion of the Act, as amended, provides as follows (73 PS 7 and 8):

> "No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, or the vending equipment from which said commodity is sold to the consumers bears the trade-mark, brand or the name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed in violation of any law of the State of Pennsylvania by reason of any of the following provisions which may be contained in such contract:
>
> "(a) That the buyer will not resell such commodity, except at the price stipulated by the vendor.
>
> "(b) That the buyer of such commodity require upon his resale of such commodity that the purchaser from him agree that such purchaser will not in turn resell except at the price stipulated by the vendor of the buyer.
>
> "Such provisions in any contract shall be deemed to contain or imply conditions that such commodities

may be resold without reference to such agreement in the following cases:

"(a) In closing out the owners stock for the purpose of discontinuing delivering any such commodity.

"(b) When the goods are damaged or deteriorated in quality, and notice is given the public thereof.

"(c) By any officer acting under orders of any court or in the execution of any writ or distress."

"Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is, or is not, a party to such contract, is unfair competition and is actionable at the suit of such vendor, buyer or purchaser of such commodity."

This Act must be read in connection with Section 1 of the Sherman Act, as amended by the addition of the two proviso clauses known as the Miller-Tydings Amendment (July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693 (15 U.S.C.A. 1)). This Act as so amended reads as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or

public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: Provided Further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The plaintiff, the manufacturer of a trade-marked product known as "Sunbeam Shavemaster," pleads diversity of citizenship with defendant and bases its claim of the existence of the required jurisdictional amount on the statement that its good will, under certain lawful contracts and its rights under the Pennsylvania Fair Trade Act aforesaid, is in excess of $10,000.00.

Plaintiff further avers that the said Sunbeam Shavemaster is in fair and open competition with commodities of the same general class produced by others; that it is the sole owner of said trade-mark; that the said trade-marked article has a good reputation among wholesalers and retailers and with the public generally; that it has been widely advertised throughout the United States in many nationally distributed publications; that an extremely valuable good

will as a consequence of said advertising and of the intrinsic merit of the product attaches to the said article and its trade-mark; that said article has been and now is sold and distributed throughout the State of Pennsylvania and plaintiff enjoys a good business therefrom; that plaintiff has entered into a number of retail contracts with retailers doing business in the State of Pennsylvania, and attached to the complaint are copies of the said contracts and Fair Trade Price Lists.

Plaintiff also avers that defendant has been guilty of unfair competition in that it has violated plaintiff's minimum retail price agreements; that he has by advertisement in various publications offered to sell the said trade-marked article at a price less than plaintiff's fair trade price; [1] that plaintiff on several occasions wrote to defendant informing him that its products were sold under the Fair Trade Act of Pennsylvania and requesting defendant to desist from offering for sale or selling said trade-marked article for less than the fair trade price; that plaintiff has received numerous complaints from retailers of its products throughout the country protesting against defendant's cut price advertising; that notwithstanding repeated notifications, defendant wilfully continued to offer for sale and to sell plaintiff's trade-marked Sunbeam Shavemaster at a price of $17.25 still knowing that the fair trade price thereof was $23.50.

Plaintiff finally alleges that such unfair competition on the part of defendant has caused plaintiff great monetary damage and that it has no adequate remedy at law unless

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[1] Paragraph V of the complaint states, inter alia,

". . . On Page 83 of 'The American Rifleman' for May, 1948, the defendant inserted the following advertisement:

'SCHICK SUPER ELECTRIC SHAVERS
$13.00, Remington Foursome
$14.00, Shavemaster $17.25,
new, latest models. S. A.
Wentling, Palmyra, Penna.'"

defendant is enjoined from further acts of unfair competition.

An answer was filed by the defendant wherein he admitted substantially all of the allegations of the complaint, excepting that he denied that his advertisements constituted offers to sell; denied the jurisdiction of this Court; denied that there was any good will attached to plaintiff's trademark, and finally, for multifarious reasons denied the constitutionality of the Pennsylvania Fair Trade Act. Defendant further filed a counterclaim for damage to his business on the theory that plaintiff's assertion of right under the Pennsylvania Fair Trade Act was contrary to the Sherman Antitrust Act.

Subsequently thereto, and after due notice to defendant, plaintiff took the deposition of Edward K. Ploner, plaintiff's Vice-President. After the filing of the deposition, plaintiff moved for summary judgment under Rule 56, Federal Rules of Civil Procedure, which motion is presently before the Court.

Mr. Ploner in his deposition avers, among other things, that the method of sale and distribution followed by plaintiff is through approximately eight hundred wholesale distributors who, in turn, sell to upward of seventy thousand retailers throughout the entire United States; that its advertising is in national magazines, local newspapers and television; that the company's approximate sales of shavers for 1946 were $1,925,000.00; in 1947, $4,057,000.00; in 1948, $5,863,000.00, and in the first six months of 1949, $1,847,000.00; that the diminishing sales in 1949 were attributable to the fact the company stayed out of the market for about five months to give their distributors, wholesale and retail, an opportunity to reduce their stock of an old model when a new model was introduced; that the company spent in direct advertising of the Shavemaster in 1946 approximately $98,000.00; in 1947, $250,000.00; in 1948, $354,000.00, and the first six months of 1949, $140,-

000.00; that when a new model is introduced to company issues a supplement to outstanding Fair Trade contracts in which prices are quoted and the effective date given; that following defendant's advertising the company received complaints from wholesale and retail distributors in Wisconsin, California, Maryland, Delaware, District of Columbia, Pennsylvania, Illinois, Minnesota and Nebraska; that the total sales of Shavemaster in Pennsylvania in 1948 was approximately $420,000.00; that in 1948 the company had about fifty wholesale and seventy-three hundred retail distributors in Pennsylvania; that unchecked violations of Fair Trade prices are detrimental to the sale of trademarked merchandice.

Thereafter, defendant filed an affidavit setting forth, inter alia, that he never saw any executed contract between plaintiff and any retailer, or the price list shown in Exhibit "A" of the complaint, prior to service of complaint on him; that he did not use the Shavemaster as a loss-leader, and was never notified by plaintiff of the discontinuance of or change in price of Shavemaster.

The complaint avers that following the May, 1948, advertisement in "The American Rifleman" plaintiff on June 8, 1948, wrote defendant as above indicated and attached to this letter two copies of its Pennsylvania Fair Trade Contract, as well as a retail price list, and invited defendant to sign both copies, return to plaintiff after which it would execute a copy and return to defendant and thus include him as one of its cooperating dealers. Defendant continued to advertise as before, whereupon plaintiff again wrote defendant on June 24, 1948, July 23, 1948, and March 4, 1949, and on the latter date by telephone conversation through its counsel again reiterating all that had previously been written. These averments are either admitted or not denied in the answer. The advertisements continued through Novmber, 1948.

In his affidavit defendant avers,

"2. That he denies ever having seen any executed contract between the Sunbeam Corporation and any retailer prior to service upon him of the complaint.

"3. That he denies ever having seen the price list shown in Exhibit 'A' of the complaint before said complaint was served on him."

The copies of plaintiff's Pennsylvania Fair Trade contracts attached to the complaint as Exhibit "A" purport to be copies of executed contracts. Defendant in his affidavit admits receiving an unexecuted copy of the identical form.

The copy of the price list attached to the complaint as part of Exhibit "A", being the letter and exhibits referred to therein, which letter defendant in paragraph VI of his answer admits having been forwarded to him, is printed on white paper and quotes prices effective July 5, 1948. Defendant in his affidavit denies the receipt of this price list, but in his answer he admitted the mailing of the letter which referred to the price list and admitted the receipt of a price list printed on yellow paper and which carried the date of April, 1948. Both lists quote the Shavemaster as Cat. No. "3" at $23.50.

From the pleadings, deposition and affidavit there is, in my opinion, no genuine issue as to any material fact.

We have here in the plaintiff the owner of two trademarks, namely, "Sunbeam" and "Shavemaster"; that it advertised and distributed a shaver under those two trademarks; that it entered into Fair Trade contracts with retailers in Pennsylvania under the provisions of Pennsylvania Fair Trade Act; that defendant with knowledge of outstanding Fair Trade contracts in Pennsylvania and price lists in connection therewith, advertised and sold six Shavemasters for $17.25 each when the listed Fair Trade price was $23.50; that said advertisement specifically used the trade-marked name of "Shavemaster." There is no question

but that this plaintiff has at a tremendous expense built up a good will for its trade-marked products.

I see no merit in defendant's captious complaints about his lack of knowledge. He admits receiving a copy of plaintiff's blank form Pennsylvania Fair Trade contract. He complains he did not see an executed copy thereof. I find nothing in the Act to indicate that defendant would be entitled to a copy of an executed contract. He was given a copy of the form of contract used in Pennsylvania and he was told that it was such. That was sufficient notice.[2]

Whether the copy of the price list attached to the complaint giving the effective date as of July 5, 1948, is or is not the same as defendant admits receiving and which was dated April, 1948, is entirely aside from the point. The fact remains both carried the only item we are here concerned with, with the same catalogue number and same price.

Finally, the defendant complains that he was not advised of subsequent price lists. So far as the record goes, the price of this article remained constant throughout the period covered by defendant's advertisements. The objection is therefore without merit.

In Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U. S. 183, the court had before it Sections 1 and 2 of the Illinois Fair Trade Act (Smith-Hurd Rev. Stat., 1935, Ill., c. 121½, Sections 186 and 189) which at that time was substantially the same as Sections 1 and 2 of the Pennsylvania Act. In holding that the Illinois Act was not in violation of the Fourteenth Amendment to the Constitution of the United States, the court stated, inter alia,

> "In the second place, §2 does not deal with the restriction upon the sale of the commodity qua com-

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[2] In Bristol-Myers Co. v. Lit Brothers, Inc., 336 Pa. 81, the court quoted a finding by the chancellor as follows:

> "'That after defendant had notice * * * that plaintiff had entered into contract with others fixing the resale price of plaintiff's products, it always sold Ipana Tooth Paste * * * and Sal Hepatica * * * at the resale prices fixed by plaintiff in contracts with others';"

modity, but with that restriction because the commodity is identified by the trade-mark, brand or name of the producer or owner. The essence of the statutory violation then consists not in the bare disposition of the commodity, but in a forbidden use of the trade-mark, brand or name in accomplishing such disposition. The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself.

* * * * * * * * *

"* * * Section 2 of the act does not prevent a purchased of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates 'unfair competition.' * * *

"There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. * * *"

I find no merit in any of the defendant's many reasons advanced in an effort to prove that the Pennsylvania Fair Trade Act is in violation of the Constitution of the United States or the Constitution of the Commonwealth of Pennsylvania.

As stated in Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra, even though this plaintiff parted with the ownership of the six shavers involved in this case,

it did not part with the good will that it had at great expense built up around the trade-mark name of those razors, namely, "Sunbeam" and "Shavemaster." This defendant did not advertise merely a razor for sale, he advertised a "Shavemaster" electric razor. By so doing he has invaded a right that this plaintiff has been given by the Fair Trade Act of the Commonwealth of Pennsylvania in respect to a sale made under the terms of that Act and that trade-mark must be kept inviolate whether the sale is intrastate or interstate.

It is true the Pennsylvania Supreme Court has never passed upon the constitutionality of the Pennsylvania Fair Trade Act; on the other hand, it has not hesitated to construe and enforce the Act.[3]

In a very well considered opinion in Pepsodent Co. v. Krauss Co., Limited, (D.C.E.D. La.) 56 F. Supp. 922, Judge Borah stated, "The history of the legislation leaves no doubt that Congress enacted the Miller-Tydings amendment with full knowledge of the provisions in state fair trade acts making resale price maintenance effective against non-contracting retailers, and that it was the design and intention of Congress to remove every obstacle which would hinder the free enforcement by the states of the provisions of their local fair trade acts in such fashion as their respective legislatures saw fit."

Congress has spoken and the legislature of Pennsylvania has spoken and there is no doubt in my mind what was the legislative intent in both instances. As to the wisdom of such legislation, we are not here concerned. As indicated above, I find nothing in the legislation violative of either the Constitution of the United States nor that of

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[3] Lentheric, Inc. v. F. W. Woolworth Co., 338 Pa. 523; Bristol-Myers Company v. Lit Brothers, Inc., 336 Pa. 81. In the latter case the court held that the peculiar facts of the case did not of themselves amount to such unfair competition as the Fair Trade Law forbids. Under the circumstances I feel that Shipman, et al. v. DuPre, 94 L. Ed. 587, has no application here

the Commonwealth of Pennsylvania.[4] All of the jurisdictional requirements are present here.

I am, therefore, of the opinion that the admitted acts of the defendant in cutting the price of plaintiff's trademarked product are in direct violation of the Fair Trade Act of the Commonwealth of Pennsylvania; that the actions of the defendant threaten irreparable damage to the plaintiff;[5] that the plaintiff has no adequate remedy at law and is entitled to the injunctive process of this Court for its protection. A decree for permanent injunction is being filed contemporaneously with this opinion.

June 10, 1950

(s) FREDERICK V. FOLLMER,

United States District Judge.

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[4] For a very able discussion of the constitutionality of a Fair Trade Act of the State of South Carolina similar to that of the Commonwealth of Pennsylvania, see Miles Laboratories, Inc. v. Seignious (D.C.E.D. S.C.) 30 F. Supp. 549.

[5] Apropos of the propriety of injunctive relief in the instant case, in Swift & Company, et al. v. United States, 276 U. S. 311, 48 S. Ct. 311, 72 L. Ed. 587, Mr. Justice Brandeis, speaking for the court, said:

> "The argument ignores the fact that a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated."

APPENDIX B

Opinion of the Circuit Court

This appeal involves the application of the Pennsylvania Fair Trade Act.[1] Plaintiff a manufacturer of electric shavers, complained of violation of the act by defendant, an individual retailer doing a mail-order business from headquarters in Palmyra, Pa. Plaintiff claimed and defendant does not deny, that defendant advertised and sold some of plaintiff's razors at a price lower than the so-called fair trade price. The district court granted relief in very broad terms.[2]

Defendant conducts a mail-order business. He advertises merchandise in publications of National circulation[3] and invites orders for the articles advertised. These articles he ships by mail or express to the buyers. What portion of defendant's sales results in shipments to Pennsylvania buyers and what portion results in shipments to out-of-State buyers is not disclosed.

Defendant has signed no contract agreeing to maintain a minimum price on plaintiff's razors. But plaintiff claims that it is entitled to relief under the nonsigner provision of the statute which states:

"Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in

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[1] Act of June 5, 1935, P. L. 266, as amended June 12, 1941, P. L. 128, 73 PS §§7 and 8.

[2] Defendant was "permanently enjoined and restrained from committing further acts of unfair competition in relation to Fair Trade Act marked products of plaintiff, Sunbeam Corporation, and from violating said plaintiff's fair trade agreements . . .". In the course of its opinion the district court states: "The trade-mark must be kept inviolate whether the sale is intrastate or interstate": Sunbeam Corp. v. Wentling, 91 F. Supp. 81 (M. D. Pa., 1950).

[3] The advertisements of which plaintiff complains appeared in two Nationally circulated magazines. The American Rifleman and Field and Stream, and in the November 28, 1948, issue of the Boston Sunday Advertiser.

any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is, or is not, a party to such contract, is unfair competition and is actionable at the suit of such vendor, buyer or purchaser of such commodity": 73 PS §8.

The case involves several points which we shall consider one at a time.

1. The constitutionality of fair trade legislation under the United States Constitution and that of the Commonwealth of Pennsylvania with regard to due process and equal protection provisions.

This need not detain us long. Similar legislation was pronounced not violative of the Federal Constitution in Old Dearborn Company v. Seagram Corporation, 299 U. S. 183 (1936). Defendant suggests that the depression conditions which prompted that result in 1936 no longer obtain and if the case now came to the Supreme Court it would be decided the other way. Perhaps so; perhaps not. We think, however, the Supreme Court decision settled the constitutionality of the fair trade acts so far as due process and equal protection under the fourteenth amendment are concerned. We should and do follow it so long as it stands as a declaration of law by the Supreme Court.

Nor do we need to take long in holding the Pennsylvania statute free from attack on the due process or equal protection clauses of the Pennsylvania Constitution. It is true that the Pennsylvania Supreme Court has not passed, in so many words, on the constitutionality of the act under the Pennsylvania Constitution. But it has applied it, apparently without question of its constitutionality.[4] A common pleas court of Philadelphia has definitely declared it to be constitutional.[5] And the overwhelm-

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[4] Lentheric, Inc., v. F. W. Woolworth Co., 338 Pa. 523, 13 A. (2d) 12 (1940).

[5] Welch Grape Juice Co. v. Frankford Grocery Co., 36 Pa. D. & C. 653 (1939).

ing weight of decision in other State courts is to the same effect.[6] Whatever may be the wisdom of this legislation, we think it well established that legislatures, in enacting it, are not violating the provisions of the United States Constitution as to due process, or equal protection, or the State constitutional equivalents thereof.

2. The Miller-Tydings Act. This statute[7] was much discussed by both parties at the argument. We think the statute was intended to relieve persons entering into contracts of the type provided for in these fair trade acts from liability under United States antitrust laws.[8] The legislation was necessary, if such immunity was to be had, because price maintenance agreements had previously been held to be a violation: Dr. Miles Medical Company v. John D. Park & Sons Company, 220 U. S. 373 (1911) (Sherman Act); FTC v. Beech-Nut Packing Co., 257 U. S. 441 (1922) (Federal Trade Commission Act). But the Miller-Tydings Act in no way, we think, affects any question of defendant's liability to plaintiff.

In this regard the case of Whitfield v. State of Ohio, 297 U. S. 431 (1936), presents an interesting parallel. In the Hawes-Cooper Act, 49 U. S. C. §60, Congress authorized the States to regulate the sale of prison-made goods even though manufactured in another State and sold within the State in the original package. Ohio had forbidden the sale of such goods in open market and defendant was convicted

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[6] Since the Seagram case the acts have been held unconstitutional in only one State: Liquor Stores, Inc., v. Continental Distilling Corp., 40 So. (2d) 371 (Fla., 1949). For a list of cases in which the various acts have been passed upon see 2 CCH-Trade Reg. Service §7128.

[7] 26 Stat. at L. 209 (1937), 15 U. S. C. §1.

[8] In Schwegmann Brothers v. Calvert Distillers Corp., 184 F. (2d) 11, 15 (5th Cir., 1950), the court states that the Miller-Tydings amendment "neither authorizes nor prohibits State legislation. . . . It is concerned with, and only with, the Sherman Act, legislation by Congress affecting interstate commerce".

of violation of the statute. The information involved contained two counts, one based on a sale within Ohio, the other on a sale to an Ohio buyer from an Alabama seller. The court stated [9] that "A serious question as to the infringement of the commerce clause of the Constitution is presented by the second count . . .", but found it unnecessary to pass on this, since the conviction was sustained by the first count which was valid because of the Hawes-Cooper Act. Thus, even though Congress had expressly left the field to State regulation, the court intimated Congress either had not or could not authorize the States directly to regulate an interstate sale. The case is not controlling here, but is an indication that we should be wary of interpreting the Miller-Tydings Act as anything more of an authorization to the States than the words require.

3. Application of the statute to interstate transactions.

Some, at least, of defendant's business is interstate commerce. That point seems to us abundantly clear, but since the parties seemed to have some dispute about it we will stop on it for a moment. First, the purchase of advertising space in a publication published in another State and of National circulation is interstate commerce.[10] Likewise, when defendant receives an order from outside Pennsylvania for an article which he fills by mailing it or sending it by express from Palmyra to a point in another State, a

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[9] Whitfield v. State of Ohio, supra, at 437.

[10] To the extent that Blumenstock Bros. v. Curtis Publishing Co., 252 U. S. 436 (1920), can be construed as holding to the contrary we think it is no longer authoritative in the light of more recent cases: United States v. Southeastern Underwriters Assn., 322 U. S. 533 (1944); North American Co. v. SEC, 327 U. S. 686 (1946). Cf. Indiana Farmers Guide Co. v. Prairie Co., 293 U. S. 268 (1934); Charles A. Ramsey Co. v. Associated Bill Posters of United States and Canada, 260 U. S. 501 (1923); Post Printing & Pub. Co. v. Brewster, 246 Fed. 321 (D. C. Kan., 1917); State v. Salt Lake Tribune Pub. Co., 68 Utah 187, 249 Pac. 474 (1926).

transaction in interstate commerce has taken place. It is immaterial, so far as this point is concerned, whether "title" passes at the place of shipping or at destination.[11] The shipment would be equally an interstate matter if no passing of title were involved in the transaction. For instance, if A, in Pennsylvania, sends a Sunbeam Shavemaster to his friend in New York as a loan, no passing of "title" is involved. But the shipment is certainly interstate commerce.

To state that defendant's business is interstate commerce does not answer the question of the applicability of a Fair Trade Act to such commerce. It is well settled that, in the absence of an occupation of the field by Congress, a State may regulate some aspects of interstate commerce.[12] But it is just as well settled that even in the absence of congressional action, the commerce clause is a limitation on the power of States to regulate interstate commerce. A State may not regulate the rates [13] or length [14] of trains even on the intrastate portion of an interstate journey; it may not prohibit the importation into the State of liquor from another State,[15] nor prohibit its sale by one who purchased it from a seller in another State and while still in the

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[11] Uniform Sales Act, §19, rule 5, Act of May 19, 1915, P. L. 543, sec. 19, 69 PS §143. Since defendant pays the cost of transportation, including insurance against loss, the presumption is that the "sale" takes place outside Pennsylvania as to out-of-State customers.

[12] Cooley v. Board of Wardens, 12 How. 299 (U. S. 1852); California v. Thompson, 313 U. S. 109, 113 (1941); California v. Zook, 336 U. S. 725 (1949).

[13] Wabash, St. Louis and Pacific Ry. v. Illinois, 118 U. S. 557 (1886).

[14] Southern Pacific Co. v. Arizona, 325 U. S. 761 (1945).

[15] Bowman v. Chicago & N. W. Ry., 125 U. S. 465 (1888). The Webb-Kenyon Act, 37 Stat. at L. 699 (1913), 27 U. S. C. §122, now prohibits the interstate transportation of intoxicants into any State for use thereof in violation of its laws. It was upheld in Clark Distilling Company v. Western Maryland Railroad Co., 242 U. S. 311 (1917). See McGovney, The Webb-Kenyon Act and Beyond, 3 Iowa L. Bulletin 145 (1917).

original package; [16] it cannot restrict the export or import of goods for the protection of local economic interests.[17] As Professor Rottschaefer puts it: "One aim of the commerce clause was the protection of interstate trade against State interference. As a limit on State powers, it is a free trade charter for National commerce." [18]

As in so many constitutional questions, the line between permissible and prohibited State regulation is not a clear one. Chief Justice Stone, in Southern Pacific Co. v. Arizona, 325 U. S. 761, 770 (1945), voiced what is apparently the presently accepted approach.[19] He said that "there has been left to the States wide scope for the regulation of matters of local State concern, even thougt it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across State lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant National concern. . . . The matters for ultimate determination are . . . whether the relative weights of the State and National interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its

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[16] Leisy v. Hardin, 135 U. S. 100 (1890). As to intoxicating liquor the rules were changed by the Wilson Act, 26 Stat. at L. 313 (1890), 27 U. S. C. §121, which authorized the States to prohibit the resale of liquor. This act was said to deprive intoxicating liquor of its interstate character.

[17] Hood & Sons v. DuMond, 336 U. S. 525 (1949); Baldwir v. Seelig, 294 U. S. 511 (1935); Pennsylvania v. West Virginia, 262 U. S. 553 (1923).

[18] Rottschaefer, The Constitution and Socio-Economic Change, 102 (1948). The same idea was forcibly stated by Mr. Justice Jackson thus: "The material success that has come to the inhabitants of the States which make up this Federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the States only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions": Hood & Sons v. DuMond, 336 U. S. 525, 538 (1949).

[19] For an excellent and up-to-date discussion of this problem see Dowling, Constitutional Law, Significant Developments in the Law During the War Years, 9 (Practising Law Institute Series, 1948).

freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from State interference".

It is not difficult to put a case in which nonuniform State laws in this price regulation field will result in a complete block to trade between States in "fair traded" commodities. Here is one. There is no requirement that the established fair trade price be uniform throughout the States.[20] Thus we have the posiblity of a situation where, for instance, the fair trade price of an article has been fixed in Pennsylvania at $1 and in South Carolina at 75 cents. If the Pennsylvania statute is permitted to govern interstate sales, no sales in that commodity can be made by Pennsylvania sellers to South Carolina buyers. If the Pennsylvania seller were to meet the competition of South Carolina sellers, he would commit a tort in Pennsylvania, and yet he would be selling at the very price set in South Carolina as "fair trade". Further, if a State may regulate the price at which an article must be sold if it is to be shipped out of the State, may it not equally well regulate the price for which the article must have been sold before it is allowed to come into the State? Tariff barriers are but feeble obstacles compared with such a blockade on the interstate movement of goods.

The possibility of such a barrier to interstate commerce from nonuniform State regulation illustrates the substantial effect such regulation will have on interstate commerce if applied to interstate sales. Such sales are a fit subject for uniform regulation should Congress desire it, and we see no peculiar local interest which justifies the imposition upon interstate commerce of such restriction by individual

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[20] The acts of 30 States authorize a minimum price, whereas the others provide for an absolute price; in 24 States a person other than the owner of the trade-mark may establish the price, in 21 any other person may not; in 29 States obliteration of the trade-mark exempts the commodity from the act, in 13 it does not. For a compilation of these and other variations see 2 CCH-Trade Reg. Service §§7011-13.

States. The local cut-price sale with a loss leader feature, which seems to have constituted a much stressed argument for the legislation, is adequately cared for in giving the statute a local application only.

These grave constitutional difficulties involved in any broader interpretation lead us to the conclusion that the Pennsylvania Fair Trade Act is to be construed as not to apply to sales by Pennsylvania retailers to consumers in other States, or to advertisements in publications published in other States. The California court dealing with a statute similar to that of Pennsylvania was so sure of this point that it hardly gave the question discussion and construed the California Fair Trade Act "as applying only to transactions within the State, that being the sole territorial extent of the legislature's powers": Max Factor & Co. v. Kunsman, 5 Cal. (2d) 446, 55 P.(2d) 177 (1936). New Jersey has evidently thought the same about its statute.[21] We think a similar construction should be given to the Pennsylvania statute. We are reinforced in this conclusion by the well-established line of authority which interprets a statute to conform to constitutional limitations whenever it is possible to do so.[22]

In view of the position we take on this matter, a modification of the district court decree will be necessary. The decree will be vacated and the case remanded to the district court with directions to enter a decree limiting the injunction against defendant to intrastate transactions in Pennsylvania, and for further proceedings not inconsistent with this opinion.

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[21] Johnson & Johnson v. Weissbard, 121 N. J. Eq. 585, 586, 191 Atl. 873 (1937). For a general discussion of the problem and a conclusion similar to that reached here, see 2 CCH-Trade Reg. Service §7308.

[22] See Kovacs v. Cooper, 336 U. S. 77, 85 (1949); Alabama State Federation of Labor v. McAdory, 325 U. S. 450, 470 (1945); Arizona Employers' Liability Cases, 250 U. S. 400, 430 (1919); United States v. Weisenbloom, 168 F. (2d) 698, 700 (2d Cir., 1949).

APPENDIX C

Section 1 of the Sherman Act (July 2, 1890, C. 647, sec. 1, 26 Stat. 209) with the Miller-Tydings Amendment thereto being the two "proviso" clauses (August 17, 1937, C. 690. Title VIII, 50 Stat. 693 [15 U. S. C. A. 1]):

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

APPENDIX D

The pertinent provisions of the Pennsylvania Fair Trade Act of 1935, June 5, P. L. 266, as amended June 12, 1941, P. L. 128 (73 P.S. 7 and 8):

"No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, or the vending equipment from which said commodity is sold to the consumer bears the trade-mark, brand or the name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed in violation of any law of the State of Pennsylvania by reason of any of the following provisions which may be contained in such contract:

"(a) That the buyer will not resell such commodity, except at the price stipulated by the vendor.

"(b) That the buyer of such commodity require upon his resale of such commodity that the purchaser from him agree that such purchaser will not in turn resell except at the price stipulated by the vendor of the buyer.

"Such provisions in any contract shall be deemed to contain or imply conditions that such commodities may be resold without reference to such agreement in the following cases:

"(a) In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

"(b) When the goods are damaged or deteriorated in quality, and notice is given the public thereof.

"(c) By any officer acting under orders of any court or in the execution of any writ or distress.

"Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated

in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is, or is not, a party to such contract, is unfair competition and is actionable at the suit of such vendor buyer or purchaser of such commodity."

APPENDIX E

The following excerpt is quoted from Alfred Lief's book, "The Brandeis Guide to the Modern World":

"If a dealer is selling unknown goods or goods under his own name, he alone should set the price; but when a dealer has to use somebody else's name or brand in order to sell goods, then the owner of that name or brand has an interest which should be respected. The transaction is essentially one between the two principals—the maker and the user. All others are middlemen or agents; for the product is not really sold until it has been bought by the consumer.

"Why should one middleman have the power to depreciate in the public mind the value of the maker's brand and render it unprofitable not only for the maker but for other middlemen? Why should one middleman be allowed to indulge in a practice of price-cutting, which tends to drive the maker's goods out of the market and in the end interferes with people getting the goods at all?

"When a trademarked article is advertised to be sold at less than the standard price, it is generally done to attract persons to a particular store by the offer of an obviously extraordinary bargain. It is a bait—called by the dealers a 'leader'. But the cut-price article would more appropriately be termed a 'mis-leader'; because ordinarily the very purpose of the cut-price is to create a false impression.

"The evil results of price-cutting are far reaching. It is sometimes urged that price-cutting of a trademarked article injures no one; that the producer is not injured, since he received his full price in the original sale to jobber or

retailer; and indeed may be benefited by increased sale, since lower prices ordinarily stimulate trade; that the retailer cannot be harmed, since he has cut the price voluntarily to advance his own interests; that the consumer is surely benefited because he gets the article cheaper. But this reasoning is most superficial and misleading.

"To sell a dollar watch for 67 cents injures both the manufacturer and the regular dealer; because it tends to make the public believe that either the manufacturer's or the dealer's profits are ordinarily exorbitant; or, in other words, that the watch is not worth a dollar.

"Such a cut necessarily impairs the reputation of the article, and by impairing reputation, lessens the demand. It may even destroy the manufacturer's market.

"A few conspicuous 'cut-price sales' in any market will demoralize the trade of the regular dealers in that article. They cannot sell it at cut prices without losing money. They might be able to sell a few of the articles at the established price, but they would do so at the risk of their own reputation.

"The cut by others, if known, would create the impression on their own customers of having been overcharged. It is better policy for the regular dealer to drop the line altogether.

"On the other hand, the demand for the article from the irregular dealer who cuts the price is short-lived. The cut-price article cannot long remain his 'leader'. His use for it is sporadic and temporary. One 'leader' is soon discarded for another. Then the cut-price outlet is closed to the producer, and meanwhile the regular trade has been lost.

"Thus a single prominent price-cutter can ruin a market for both the producer and the regular retailer is serious.

"On the other hand, the consumer's gain from price-cutting is only sporadic and temporary. The few who buy a standard article for less than its value do benefit—unless they have, at the same time, been misled into buying some other article at more than its value. But the public generally is the loser; and the losses are often permanent."

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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 538

SUNBEAM CORPORATION, a Corporation,

Petitioner,

VS.

S. A. WENTLING,

Respondent.

BRIEF OF STATE OF ILLINOIS SPONSORED BY IVAN A. ELLIOTT, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, IN SUPPORT OF THE PETITION OF SUNBEAM CORPORATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Application for Leave to File Brief as Amicus Curiae.

Ivan A. Elliott, Attorney General of the State of Illinois, respectfully applies for leave to file his brief as *amicus curiae* herein on behalf of the State of Illinois.

Illinois here is concerned as to an area of interstate commerce, regulation of which has been abdicated by the Federal Government. Illinois, in interest of its own sovereignty, acting through its Attorney General, feels it necessary to project its own ideas and arguments against the holding of the Circuit Court below.

Reference to Opinions Below.

The opinion of the Court of Appeals below is published in 185 Fed. 2d 903. The opinion of the District Court is set forth in full as Appendix A in Petitioner's brief.

Basis On Which It Is Contended That This Court Has Jurisdiction.

This Court's jurisdiction is invoked under Section 1257, 28 U. S. C. A.

Leave to file this brief as *amicus curiae* is sought pursuant to Rule 27, sub-paragraphs 9(b) and (c), of the Rules of this Court.

The reason prompting this application for leave to file the instant brief is that the decision of the Court of Appeals below frustrates the right and power of the State of Illinois to lend enforcement to effective Fair Trade contracts made and entered into as permitted by the Miller-Tydings amendment to the Sherman Act (15 U. S. C. A. 1) and the Illinois Fair Trade Act (Ill. Rev. Stats. 1949, Ch. 121½, Pars. 181, 189).

Statement of the Case.

All of the facts material to the consideration of the questions presented, with page references, appear at pages 10 to 12 of Petitioner's brief.

As to the interest of the applicant here, the State of Illinois enacted a Fair Trade Act in 1935, the text of which is set forth as Appendix I (Laws 1935, p. 1436; Ill. Rev. Stats. 1949, Ch. 121½, Pars. 188, 189). The validity of this statute was upheld by this Court in *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183.

The Illinois Fair Trade Act is almost identical to the Pennsylvania Fair Trade Act involved here (Act of June 5, 1935, PL 266; June 12, 1941, PL 128; 73 PS 7, 8).

The Court of Appeals below has held that contracts entered into as authorized by the Pennsylvania Fair Trade Act may not be enforced if they are to be effective beyond Pennsylvania's boundaries. Such a holding, for all practical purposes, nullifies the effectiveness of that Act, in that it charts out a course of dealing which Fair Trade contracts made and entered into under Pennsylvania law can have no effect to control.

If that ruling correctly states the law, then there may be no effective control of prices under the Illinois Fair Trade Act, because the course of dealing there sanctioned would permit a vendor of trade-marked commodities operating outside its boundaries to flood the Illinois market with such trade-marked commodities at prices less than those required of retailers selling such commodities within Illinois boundaries.

ARGUMENT.

The Sherman Act, enacted in 1896 provided:

> "Every contract * * * in restraint of trade or commerce among the several states * * * is illegal." (15 U. S. C. A. 1.)

This was a declaration of policy by Congress outlawing such contracts which regulated interstate commerce. Congress was authorized to legislate in this field, and declare the policy of the nation, by reason of the commerce clause of the Federal Constitution (Art. I, Sec. 8).

The Miller-Tydings amendment of 1937 added the following proviso:

> "* * * nothing * * * (herein) shall render illegal contracts or agreements prescribing minimum prices for the resale of a (trade marked) commodity * * * when (such) contracts * * * are lawful as applied to intrastate transactions, under any (local) statute (effective where) such resale is to be made, * * * or * * * (where) the commodity is to be transported for such resale * * *" (15 U. S. C. A. 1).

This amendment altered the declared policy expressed by Congress in the Sherman Act, so as to condone, or even approve, vertical contracts which restricted resale of trademarked commodities upon a minimum price. It expressed that policy of approval of such contracts, whether their effect was local or purely intrastate, or whether their effect extended beyond local boundaries and was interstate. It said, so long as the applicable local statute permitted or approved, such contracts which affect interstate commerce should be legal, effective and enforceable.

The Circuit Court below has termed the Pennsylvania Fair Trade Act itself as being regulatory of interstate

commerce. It has misconceived the actual situation. It is not the Fair Trade Act which regulates interstate commerce; it is the *contracts* which do so; and Congress has declared its policy as not rendering nugatory such contracts when they attempt so to do.

Forty-four states have enacted fair trade statutes. (2 CCH Trade Reg. Serv. 7079, § 7094). That of Illinois (Ill. Rev. Stats., 1949, Ch. 121½, Pars. 188, 189; Laws 1935, p. 1436) declares (Section 1):

> "No contract relating to the sale or resale of a (trade marked) commodity * * * shall be deemed in violation of * * * law * * * by reason of * * * the following provisions * * *:
>
> (1) That the buyer will not resell except at the price stipulated * * *;
>
> (2) That the producer or vendee * * * require upon the sale * * * to another * * * that he will not, in turn, resell except at the price stipulated by such producer or vendee * * *."

Section 2 of the statute provides:

> "Willfully and knowingly, advertising, offering for sale, or selling any commodity at less than the price stipulated * * * whether or not the person so (doing) is * * * a party to such contract, is unfair competition and * * * actionable * * *".

The first section is a declaration of policy by the State that such contracts, regulating either local or interstate commerce, are not counter to the policy of the State enacting such law.

The crucial question is whether Section 2 of the Fair Trade Acts, all of which are substantially similar, are themselves a regulation of commerce, either intrastate or interstate, or whether their provisions simply provide a means of enforcing the contracts which are authorized by the expressed policy both of the Federal Government and

of the States. We are sure that the latter is the answer, and not the former.

The Fair Trade Acts envision a course of vertical price fixing of trade-marked articles. Sub-paragraph 1 of Section 1 contemplates a merchandising chain with but one link between the producer and the consumer, namely, the retailer. It approves contracts between the producer and the retailer which would compel the retailer to resell at a minimum price. In such cases the retailer is a party to the contract, and clearly his breach of the contract is actionable.

The great bulk of merchandising systems, however, are not so simple. In many cases the producer sells to a wholesaler, the wholesaler to a distributor, the distributor to a jobber, and the jobber to the retailer. Some may have more links. and some may have less; but rarely does the producer sell direct to the retailer.

Sub-paragraph 2 of Section 1 envisions this type of a merchandising chain. In it, the only one with whom the producer has a *direct* contractual relation is the wholesaler. That sub-paragraph provides that when the producer sells to the wholesaler, he not only may exact a minimum resale price from the wholesaler, but also compel the wholesaler, in turn, to require a minimum resale price from his vendee, and so on down the succeeding links of the merchandising chain. Now it is obvious that under such a system of vertical merchandising there are bound to arise instances where some one of the links in that chain would acquire the trade-marked goods without being a party to any fair trade contract,—this by reason of one of the vendees of the trade-marked commodity refusing or neglecting, in turn, to exact a promise from *his* vendee.

When Section 2 makes actionable advertising, offering for sale, or selling any commodity at less than the fair trade

price, whether the person so doing is a party to the contract, or not, it contemplates a sale by such a vendee, who has knowledge of the previous contracts. That is the reason for making *wilful* and *knowing* resales actionable, and not resales made without knowledge of such contract provisions. This section simply provides for enforcement of the contracts. At most it enlarges a remedy otherwise existent.

This does no violence to concepts of the law of contracts. It is analogous to enforcement of covenants running with the land; or to damages for wilfully causing breach of a contract by one not a party thereto (*Port Chester Wine & L. Shop.* v. *Miller Bros.*, 281 N. Y. 101; 22 N. E. 2d 253, 254).

The viewpoint expressed here finds support in *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, 193, 194, where it is said:

> "Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under § 2 of the law by which such acquisition was conditioned. * * * Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it."

Section 2 viewed in this light, does not itself prescribe a regulation of commerce. Such a construction would make it illegal even on an intrastate basis. *Doubleday, Doran & Co.* v. *Macy & Co.*, 269 N. Y. 272; 199 N. E. 409, 411; 103 A. L. R. 1325. Moreover, if the statute itself were regula-

tory, and itself fixed and regulated prices, it would be an unlawful delegation of legislative authority, since the terms of such price fixing would not be fixed by the legislature, but rather by reference to any number of contracts which had no existence at the time of such legislation. Such a construction was thrust aside in *McNeil* v. *Triner Corp.*, 363 Ill. 559, 581, 582.

The true and proper construction of Fair Trade Acts, as we have shown above, is simply that they declare State policy in approval of such contracts, and provide a means of enforcing them.

This construction is exactly and literally within the permissive area of the regulation of commerce by such contracts afforded by the Miller-Tydings amendment to the Sherman Act; and its correctness is emphasized by reason of the apparent similarity and draftsmanship between the State statutes and the enabling Federal Amendment.

So when the local statutes are viewed in their proper perspective, we see that they simply authorize and provide means of enforcing restrictive contracts, in a narrow area, which the Miller-Tydings amendment condones and approves, insofar as those contracts regulate interstate commerce within that area.

Certainly courts, State or Federal (where diversity exists) may enforce those contracts.

Conclusion.

For the foregoing reasons the Attorney General of Illinois respectfully urges that a writ of certiorari should issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX I.

THE ILLINOIS FAIR TRADE ACT (ILL. REV. STAT. 1949, CH. 121½, PARS. 188, 189).

§ 188. **Contract relating to sale not invalid because of certain provisions.** No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice if given to the public thereof.

(3) By any officer acting under the orders of any court.

§ 189. **Advertising for sale at less than stipulated price.** Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.